No. 77-134

In the Supreme Court of the United States

OCTOBER TERM, 1977

REGULAR COMMON CARRIER CONFERENCE OF THE AMERICAN TRUCKING ASSOCIATIONS, INC., PETITIONER

v.

INTERSTATE COMMERCE COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Kroblin Refrigerated Express, Inc., and Schanno Transportation, Inc., filed applications with the Interstate Commerce Commission for certificates of public convenience and necessity authorizing operation as common carriers by motor vehicle between the terminals and facilities of three "freight forwarders" as defined by 49 U.S.C. 1002 (a)(5).[1] Petitioner[2] protested the applications, urging

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[1]Freight forwarders are regulated under Part IV of the Interstate Commerce Act, as added, 56 Stat. 284-300, and amended, 49 U.S.C. 1001-1022. A freight forwarder has a common carrier's responsibility for the shipper's goods, which move on the freight forwarder's bill of lading. The freight forwarder provides assembly and consolidation of the shipper's property at its origin and break-bulk and distribution of the property at the destination, employing carriers subject to Parts I (rail), II (motor), or III (water) of the Interstate Commerce Act for the underlying transportation services. *Investigation into Status of Freight Forwarders*, 339 I.C.C. 711.

[2]Petitioner is a conference of motor carriers. None of the protesting individual motor carriers filed a petition for review of the

the Commission to overrule its earlier decisions holding that the needs of freight forwarders may be considered in determining the public convenience and necessity. The Commission, rejecting this contention, found that existing service between the forwarders' facilities was inadequate and that the proposed operations were required by the public convenience and necessity (Pet. App. 26a):

> [A] grant of authority is warranted on grounds of inadequate existing service. Rail TOFC [trailer-on-flatcar] service has been demonstrated to be slow and erratic, and we disagree with the Administrative Law Judge that transit times of 5 to 11 days are adequate, particularly when the forwarders' trailers are delivered to and picked up from the TOFC ramps in a sealed condition and no terminal operations are involved. Joint-line motor carrier service is likewise slow and erratic, and it is significant that no rail carrier and only three motor common carriers oppose the application. As to the protestants, (a) none serves New Orleans, (b) none has solicited or handled any of the supporting forwarders traffic, and (c) none indicated except in the most general terms, the nature, frequency, and quality of service it would provide. The record is silent upon such matters as how much and how often equipment would be available for the supporting forwarders use, whether and under what conditions protective service is offered, and what transit times could be expected between the involved points.

The Commission therefore granted the applications. The court of appeals affirmed (Pet. App. 3a-9a).

Commission's decision, nor did any intervene in the court of appeals' proceeding.

The decision below is correct and does not warrant review by this Court. Early in this century the Court held that, in their relation to carriers, freight forwarders have the status of shippers. *Interstate Commerce Commission* v. *Del., L. & W. R.R.*, 220 U.S. 235. In recognition of this status, the Commission long has considered the needs of freight forwarders in deciding motor carrier applications for operating authority. *Central Forwarding Inc., Extension—Household Goods*, 107 M.C.C. 706, 714, modified on other grounds, *sub nom. Joe M. Crocker, Common Carrier Application*, 110 M.C.C. 29; *Dobbert Common Carrier Application*, 73 M.C.C. 711, 714; cf. *Globe Cartage Company, Inc., Common Carrier Application*, 42 M.C.C. 547.

The rates charged for existing service are relevant in assessing forwarders' needs. *Armellini Express Lines, Inc., Extension—Freight Forwarder Traffic*, 113 M.C.C. 603, affirmed *sub nom. Alterman Transport Lines, Inc.* v. *United States*, 361 F. Supp. 664 (M.D. Fla.). But petitioner's contention that the court of appeals requires motor carriers to maintain special rates for freight forwarders (Pet. 2, 5) is incorrect. No such requirement was sought or imposed in this case. The Commission simply assessed the factors bearing upon the public interest in additional motor carriage, including the benefits of the applicants' proposed rates and service. Its decision thus "reflects the kind of judgment that is entrusted to it, a power to weigh the competing interests and arrive at a balance that is deemed 'the public convenience and necessity.' " *Bowman Transportation* v. *Arkansas—Best Freight System, Inc.*, 419 U.S. 281, 293. See also *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65; cf. *United States* v. *Dixie Highway Express, Inc.*, 389 U.S. 409. Since the

Commission considered all the relevant factors, its decision, contrary to petitioner's contention (Pet. 7), is supported by *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83.

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

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